No. 687

In the Supreme Court of the United States

OCTOBER TERM, 1946.

JOHN H. FAHEY AND A. A. AMMANN, INDIVIDUALLY AND RESPECTIVELY AS FEDERAL HOME LOAN BANK COMMISSIONER AND CONSERVATOR FOR THE LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION,

Appellant,

vs.

PAUL MALLONÉE, C. H. NEWHOUSE, WINNIE BUCKLIN, *et al.*

Appellees.

On Appeal from the District Court of the United States for the Southern District of California.

BRIEF OF APPELLEE FEDERAL HOME LOAN BANK OF LOS ANGELES.

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BRIEF OF APPELLEE FEDERAL HOME LOAN BANK OF LOS ANGELES.

Statement.

This appellee accepts the Statement of the Case set forth in the Brief for Appellants, subject to any modifications or corrections which may be suggested by other appellees herein. The background relative to this appellee's connection with the litigation will be set forth in the course of its discussion of the point raised by appellant to the effect that the third party complaint against the Federal Home Loan Banks, including this appellee, was erroneously allowed.

Summary of Argument.

I. The District Court did not err in passing upon the constitutionality of Section 5(d) of the Home Owners' Loan Act.

A. Under the facts of this case, the rule which ordinarily requires an exhaustion of administrative remedies has no application.

1. If, as is contended on the merits, Section 5(d) is unconstitutional, appellees were under no duty to seek an administrative hearing. The present question must therefore be subordinated to the decision on the merits.

2. If, as the record reveals, the holding of the Administrative hearing was enjoined upon the ground, *inter alia*, that the issue presented therein was purely one of law, the District Court did not err in enjoining the holding of such hearing.

3. If, as the record reveals, the charges of bias and prejudice upon the part of the Administrator were not only supported by affidavit or other evidence, but stood uncontradicted, the District Court did not err in enjoining the holding of the administrative hearing, for in such a case it cannot be said that the court committed an abuse of discretion.

B. Appellees are not estopped from contesting the validity of Section 5(d) of the Act.

1. Section 5(d) is and was intended to be severable in its provisions, with the result that the rule has application which permits an attack upon the con-

stitutionality of a severable portion of an otherwise valid statute under which benefits have been received.

a. One who accepts the benefits of a statute is not thereby precluded from asserting the constitutional invalidity of a separable portion thereof.

C. The presence or absence of Fahey as a party was wholly immaterial in so far as the main question on this appeal is concerned: Whether or not the assets and properties of the Long Beach Association should be returned for the constitutional reasons declared by the three judge court.

1. Appellants, in the court below, expressly disclaimed that Fahey was an indispensable party in so far as the constitutional question was concerned, and their motion to dismiss was not pressed in this regard. As a result, their arguments with reference to the presence or absence of Fahey go only to the form of the decree and do not affect the question as to whether the three judge court was right or wrong on the merits in holding Section 5(d) unconstitutional.

2. The present cause is an action brought to enforce a claim to real and personal property within the district where the action was brought, within the meaning of Section 57 of the Judicial Code; and such relief *in personam* as was prayed was purely incidental to the enforcement of such claim.

3. In an action where, as here, relief against administrative acts is sought on constitutional grounds, the presence or absence of the superior (here Fahey) is immaterial in any event.

II. Section 5(d) of the Home Owners' Loan Act is unconstitutional for failure to specify reasonably definite standards for administrative action.

A. Appellants' recourse to functional definitions, the general body of equity jurisprudence, the laws of the forty-eight states and other collateral material in an effort to impute standards where none have been provided by Congress, only serves to emphasize the deficiencies of the statute in this regard.

B. A comparison of Section 5(d) with kindred enactments of Congress likewise emphasizes the deficiencies of the section in so far as any standard is concerned.

III. The District Court did not err in entering a final judgment.

A. Entry of a final judgment without a trial is warranted where there are no material issues of fact to be tried.

1. Since it was conceded that the assets of the Long Beach Association were seized under the purported authority of Section 5(d) of the Home Owners' Loan Act, the responsive pleadings of defendants raised and could have raised no material issue of fact in view of the holding of unconstitutionality.

IV. The third party complaint against the Federal Home Loan Banks, including this appellee, was properly allowed.

A. Permission to file a third party complaint is discretionary, and under the facts here present there was no abuse of discretion.

ARGUMENT.

At the threshold of our discussion, and before passing to the questions involved in a decision of the cause on the merits, it becomes necessary to consider the contentions of appellants that the three judge court should not have passed upon the constitutionality of Section 5(d) of the Home Owners' Loan Act, 12 U. S. C. 1464(d).

In this behalf, it is said that appellees should have exhausted their administrative remedy (as attempted to be provided by Paragraph 206.2 of what appellants, Br. p. 29, term the applicable regulations) before seeking judicial relief; that appellees were in any event estopped from contesting the validity of Section 5(d); and that, lastly, the District Court's asserted lack of jurisdiction over Fahey prevented the granting of "much, if not all," of the relief against appellants. These contentions will be answered in the order in which we have above set the forth.

I.

Under the Facts of This Case, the Rule Which Ordinarily Requires an Exhaustion of Administrative Remedies Has No Application.

In order intelligently to discuss this question, it is first necessary to have brief recourse to the record. Paragraph 206.2 of the regulations, mentioned above, provides that a non-consenting Federal association (as here appellee Long Beach Federal Savings & Loan Association) may apply for a hearing to contest the appointment of a conservator or receiver, such application to be made within 14 days after such appointment. No such right is, even purportedly conferred by the regulation upon persons in the position of the plaintiffs below, who are shareholder members of such association. [R. 3-4.] Within the time

specified by the regulations, appellee Long Beach Association demanded a more definite statement of the causes for the appointment of the conservator and also demanded the hearing mentioned above. [R. 83, 84, 86-87, 92-94.] The plaintiffs, appellee shareholders, sought for and obtained a preliminary injunction restraining the holding of such hearing [R. 98-124, 236-245], upon the grounds that, in substance, the Administrator was biased and prejudiced, had already prejudged the question, and that in any event, any determination of the matter would rest upon the solutions of questions of law, and particularly of constitutional law, alone. This application was joined in by appellee Title Service Co. [R. 125-139], and, ultimately, by the Long Beach Association, whose counsel stated its position to the District Court, at the time the preliminary injunction was issued, as follows [R. 567-8]:

> "Mr. Walker (Counsel for defendants): May I ask a question of counsel? Do you withdraw, on behalf of the Association, the request for an administrative hearing?
>
> "Mr. Chapman (Counsel for appellee Long Beach Association): No, we would like to get someone whom we consider has not already prejudged us to hear the question of whether we should be seized and confiscated or not. When we applied for this hearing we hadn't heard the congressional committee testimony and we hoped we might get someone impartial. After the congressional hearing* you announced back there that we would never get our association back.

*Reference is had to hearings preceding report of Select Committee to Investigate Executive Agencies, House Report No. 2659, 79th Congress, 2d Session, dealing with the seizure by the Home Loan Bank Administration of the Federal Home Loan Bank of Los Angeles and the Long Beach Federal Savings and Loan Association.

That has not been denied. That has been put in the record here. We certainly do not intend to submit to that kind of a hearing unless Your Honor or someone orders us to."

In this state of the record the true question would seem to be, not whether appellees were debarred from relief in failing to exhaust their administrative remedy, if any, but, rather, whether the District Court erred in granting the preliminary injunction restraining the holding of the administrative hearing. (We shall deal later with the proposition as to whether or not the court properly granted the permanent injunctions complained of.) Each of these alternative questions is, however, completely answered by the propositions stated below.

A. If, as Is Contended on the Merits, Section 5(d) Is Unconstitutional, Appellees Were Under No Duty to Seek an Administrative Hearing. The Present Question Must Therefore be Subordinated to the Decision on the Merits.

It is well settled that where the statute under attack (as here Section 5(d)) is void upon its face, an exhaustion of administrative remedies or other recourse to the statutory procedure is not required prior to the institution of judicial proceedings. *Lovell v. Griffin*, 303 U. S. 444; *Smith v. Cahoon*, 283 U. S. 553; *Euclid v. Amber Realty Co.*, 272 U. S. 365; *Skinner & E. Corp. v. U. S.*, 249 U. S. 557; *Yarnell v. Hillsborough Packing Co.*, 5 Cir., 70 F. (2d) 435.

Here, of course, the basic claim of appellees was that Section 5(d), the statutory source of the regulations under consideration, is void; and the lower court so held. If the court was right, under the authorities above cited a recourse to the hearing procedure was unnecessary; if it was wrong, a matter which may only be determined

after an examination into the merits of this appeal, the question of whether recourse to the administrative practice should have been had becomes, a matter of purely academic importance. The result is that in any event the question must and should be subordinated to the decision on the merits herein.

B. If, as the Record Reveals, the Holding of the Administrative Hearing Was Enjoined Upon the Ground, Inter Alia, That the Issue Presented Therein Was Purely One of Law, the District Court Did Not Err in Enjoining the Holding of Such Hearing.

As we have seen, the enjoining of the administrative hearing was sought and granted upon two grounds: (1) that the Administrator was biased and prejudiced and (2) that the question presented, namely, the constitutionality of Section 5(d), was purely a question of law.

It cannot be denied that the gist of appellees' whole case, so far as the issues material to this appeal are concerned, lay in the claim that Section 5(d) involved an unconstitutional delegation of legislative power. [R. 616, 625.] It likewise cannot be denied that this claim presented purely and simply a question of law. The result is that the well established rule that the prerequisite of a preliminary resort to administrative authority is dispensed with when the issue is purely one of law, and as such, determinable without reference to the exercise of administrative discretion, is here fully applicable. *W. P. Brown & Sons Lumber Co. v. Louisville & N. R. Co.*, 299 U. S. 393; *Baltimore & O. R. Co. v. Brady*, 288 U. S. 448; *Great Northern R. Co. v. Merchants Elevator Co.*, 259 U. S. 285; *Pennsylvania R. Co. v. Puritan Coal Min. Co.*, 237 U. S. 121.

C. If, as the Record Reveals, the Charges of Bias and Prejudice Upon the Part of the Administrator Were Not Only Supported by Affidavit or Other Evidence, But Stood Uncontradicted, the District Court Clearly Did Not Err in Enjoining the Holding of the Administrative Hearing, for in Such a Case it Certainly Cannot be Said That the Court Committed an Abuse of Discretion.

We start, of course, with the general principle that the granting or denying of a preliminary injunction is within the sound discretion of the trial court, whose action will not be reviewed unless an abuse of discretion clearly appears. *Rogers v. Hill*, 289 U. S. 582; *State of Alabama v. United States*, 279 U. S. 229; *Prendergast v. N. Y. Telephone Co.*, 262 U. S. 43; *Meccano, Ltd. v. Wanamaker*, 253 U. S. 136; *Gaines Dry Cleaners v. City of Chicago*, 7 Cir., 123 F. (2d) 104; *Hannan v. City of Haverhill*, 1 Cir., 120 F. (2d) 87; *Federal Trade Commission v. Thomsen-King & Co.*, 7 Cir., 109 F. (2d) 516.

The question here was whether the evidence submitted to the District Court in the form of affidavits and attached exhibits was sufficient to render inapplicable the rule that a court will ordinarily presume that administrative officers will discharge their duties fairly and impartially.

As to this there can be but one answer. Without going into great detail, the record shows that a direct charge of bias and prejudice on the part of the Administrator was made [R. 101], *and nowhere denied*. It was likewise di-

rectly charged, by affidavit, that the Administrator and other responsible officers of the Federal Home Loan Bank Administration "have prejudged, determined, concluded and decided before hearing that they will not, under any circumstances irrespective of evidence submitted, ever return to the Long Beach Federal Savings & Loan Association and its duly elected officers and directors, whoever they may be, the assets of said Association, . . ." [R. 123.] This charge was likewise not denied.

We thus find specific charges of unfairness which stood wholly uncontradicted. Under these circumstances, we venture the opinion that the District Court would have abused its discretion if it had *not* enjoined the holding of what would have been but a sorry caricature and mockery of a "hearing." Compare *Morgan v. United States*, 304 U. S. 158; *Tumey v. Ohio*, 273 U. S. 510; *National Labor Relations Board v. Phelps*, 5 Cir., 136 F. (2d) 562; *Inland Steel Co. v. National Labor Relations Board*, 7 Cir., 109 F. (2d) 9.

It is respectfully submitted that for the reasons above given, the question of exhaustion of remedies is entirely a false quantity in this case.

We now turn to the claim that appellees are estopped from contesting the validity of Section 5(d).

II.

Appellees Are Not Estopped From Contesting the Validity of Section 5(d) of the Act.

The claim is made that because the Long Beach Association was organized under Section 5 of the Act,* because it agreed in its charter, both original and as amended, that it was subject to the provisions of the Act and to the rules and regulations made thereunder and because it has enjoyed the benefits of the Act since, it is now estopped to assert the invalidity of what appellants claim to be an "integral" part of the Act.

The presence of the word "integral" in appellants' chain of reasoning is the weak link in their argument, for Section 5(d) is clearly severable.

A. Section 5(d) Is and Was Intended to be Severable in Its Provisions, With the Result That the Rule Has Application Which Permits an Attack Upon the Constitutionality of a Severable Portion of an Otherwise Valid Statute Under Which Benefits Have Been Received.

The claim that Section 5(d) is an integral part of the statute is gratuitously made, is supported by neither reason nor authority and is directly contrary to the expressed intention of Congress when it enacted the statute.

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*This is, of course, an understandable overstatement on the part of appellants, as the course of the argument will show. The fact is that the Association was incorporated under Section 5(a) of the Act, which embodies a complete plan for the organization, incorporation, examination, operation, and regulation of federal savings and loan associations.

When Congress enacted the Home Owners' Loan Act, it enacted, as a part thereof, Section 9 (12 U. S. C. 1468), *a separability clause* which provides as follows:

> "If any provision of this chapter, or the application thereof to any person or circumstances, is held invalid, the remainder of the chapter, and the application of such provision to other persons or circumstances, shall not be affected thereby. June 13, 1933, c. 64, §9, 48 Stat. 135; Apr. 27, 1934, c. 168, §15, 48 Stat. 647."

This enactment, of course, amounted to a clear expression of the Congressional intent that no constitutionally invalid provision of the Act should be deemed to be incapable of being severed therefrom, since the balance of the Act was to stand unaffected. It follows that it was likewise the Congressional intent that no provision of the Act should be regarded as an "integral" portion of the Act in the face of an attack upon its constitutional validity. As said by this Court in *Electric Bond & Share Co. v. Securities and Exchange Commission*, 303 U. S. 419, 434, with reference to an almost identical clause in the Public Utility Holding Co. Act of 1935, 49 Stat. 803:

> "This provision reverses the presumption of inseparability—that the legislature intended the Act to be effective as an entirety or not at all. Congress has established the opposite presumption of divisibility. Williams v. Standard Oil Co., 278 U. S. 235, 242; Utah Power & Light Co. v. Pfost, 286 U. S. 165, 184; Champlin Refining Co. v. Corporation Commission, 286 U. S. 210, 235. Congress has thus said that the statute is not an integrated whole, which as such must be sustained or held invalid. On the contrary, when validity is in question, divisibility and not

integration is the guiding principle. Invalid parts are to be excised and the remainder enforced. When we are seeking to ascertain the congressional purpose, we must give heed to this explicit declaration."

Once this point is reached, the true question appears: May one who has accepted the benefits of a statute generally, be held to be estopped to attack a severable and unconstitutional portion thereof? And the authorities uniformly hold that this question must surely be answered in the negative.

1. One Who Accepts the Benefits of a Statute Is Not Thereby Precluded From Asserting the Constitutional Invalidity of a Separable Portion Thereof.

The above principle is clearly established both with reference to statutes which, as here, contain a severability clause, *United States v. Rappeport*, D. C. N. Y., 36 F. Supp. 915, affirmed 2 Cir., 120 F. (2d) 236; *Kristanik v. Chevrolet Motor Co.*, 335 Mo. 60, 70 S. W. (2d) 890, and with reference to statutes as to which severability of the offending provision has been determined despite the absence of such a clause. *W. W. Cargill Co. v. Minnesota*, 180 U. S. 452; *Chevy Chase Sanatorium v. District of Columbia*, 46 App. D. C. 558; *State v. Consumers Public Power District*, 143 Neb. 753, 10 N. W. (2d) 784; *May v. City of Kearney*, 145 Neb. 475, 17 N. W. (2d) 448; *Petition of Philadelphia, M. & S. St. R. Co.*, 203 Pa. 354, 53 Atl. 191. This principle is basic in the law of California, appellees' home state. *Mojave River Irr. District v. Superior Court*, 202 Cal. 717, 262 Pac. 724; *California Delta Farms, Inc. v. E. Bay Municipal*

Utility District, 202 Cal. 793, 262 Pac. 729. In the *Mojave* case mentioned above, the California Supreme Court said (p. 730):

> "We do not think that the principle of estoppel can be so far applied as to prevent a party who may be entitled to the benefits to be obtained by application to an administrative board or officer from asserting in a court of justice that other and severable portions of the law under which he makes such application and receives such benefit, and which impair his full enjoyment thereof, are void because violative of the constitution; nor do we think the cases cited by the respondents sustain so extreme an application of the principle of estoppel. We find no merit, therefore, in this final contention."

The following language from *Morse v. Metropolitan S.S. Co.*, 88 N. J. Eq. 325, 102 Atl. 524, affords perhaps the most direct answer to appellants' contentions here:

> "The argument advanced by counsel for the respondent in support of the constitutionality of the provision in section 65 of the act for the appointment of a statutory receiver without notice, with the rights and powers under section 68 of the act, is that, because the defendant was incorporated under that act, has only such privileges as the state by the statute gives it, and allowed itself to come into existence under a charter from the state, which was expressly subject to the liability that under conditions which come within the purview of the statute application could be made to the court and a receiver appointed, and which terms the defendant accepted by incorporating under the act, therefore it is not depriving the defendant of any of its rights or due process of law, since the defendant must be considered to have

waived its rights when it accepted the charter under a statute containing these provisions.

"The unsoundness of this contention is apparent. Persons, whether natural or artificial, will be presumed to have entered into a contract with reference to the valid laws of the state. Only the provisions of the contract which are legally enforceable will control the parties thereto. The fact that the defendant incorporated under an act which contained an unconstitutional provision cannot render the provision enforceable, nor confer any power on the court to enforce it."

The authorities cited by appellants as to this phase of the case do not stand close analysis. Upon examination they fall into the following categories, none of which are of any aid to appellants as regards the question under discussion:

1. Cases in which a person who had accepted benefits under a particular act was held estopped to challenge the constitutionality of the *entire* act. *Booth Fisheries Co. v. Industrial Commission*, 271 U. S. 208; *American Bond & Mortgage Co. v. United States*, 7 Cir., 52 F. (2d) 318; *North Dakota-Montana W. G. Association v. United States*, 8 Cir., 66 F. (2d) 573; *Moor v. Texas & N. O. R. Co.*, 5 Cir., 75 F. (2d) 386; *Daniels v. Tearney*, 102 U. S. 415.

2. Cases in which it was claimed that a statute was being unconstitutionally *applied* rather than that the statute itself was unconstitutional. *Pierce Oil Corp. v. Phoenix Refining Co.*, 259 U. S. 125; *St Louis Malleable Casting Co. v. Prendergast Construction Co.*, 260 U. S. 469; *Shepard v. Barron*, 194 U. S. 553.

3. Cases in which the particular section of a statute attacked as unconstitutional was an integral part and an *inseparable condition* of the section under which a benefit had been received. *Nuckolls v. United States,* 10 Cir., 76 F. (2d) 357; *Electric Co. v. Dow,* 166 U. S. 489; *Eliason v. Wilborn,* 281 U. S. 457; *Grand Rapids & Indiana Railway Co. v. Osborn,* 193 U. S. 17; *United States v. San Francisco,* 318 U. S. 16.

4. Cases holding that one cannot both assail the integral portions of a statute and rely upon it in the same proceeding. *Hurley v. Commission of Fisheries,* 257 U. S. 223; *Baltimore & Ohio Railroad Company v. Lambert Run Coal Company,* 4 Cir., 267 F. 776; *Buck v. Kuykendall,* 267 U. S. 307; *Wall v. Parrot Silver & Copper Co.,* 244 U. S. 407; *United Fuel Gas Co. v. Railroad Commission,* 278 U. S. 300.

5. Cases which, if they have any application to the question at all, are favorable to the contentions of appellees. *Ashwander v. Tennessee Valley Authority,* 297 U. S. 288; *Frost v. Corporation Commission,* 278 U. S. 515.

We now turn to the questions raised by appellants with reference to the asserted lack of jurisdiction of Fahey and the claim that the latter is an indispensable party to the granting of "much, if not all, of the relief secured by appellees."

III.

The Presence or Absence of Fahey as a Party Was Wholly Immaterial Insofar as the Main Question on This Appeal Is Concerned: Whether or Not the Assets and Properties of the Long Beach Association Should Be Returned for the Constitutional Reasons Declared by the Three-Judge Court.

A. Appellants, in the Court Below, Expressly Disclaimed That Fahey Was an Indispensable Party in so Far as the Constitutional Question Was Concerned, and Their Motion to Dismiss Was Not Pressed in This Regard. As a Result, Their Arguments With Reference to the Presence or Absence of Fahey Go Only to the Form of the Decree and Do Not Affect the Question as to Whether the Three Judge Court Was Right or Wrong on the Merits in Holding Section 5(d) Unconstitutional.

It is said by appellants that Fahey was an indispensable party *at least* as to the injunction against merger of the Long Beach Association and against the holding of an administrative hearing. We have already shown that the matter of the administrative hearing was and is a wholly false quantity under the facts of this case; and that plaintiffs and the Long Beach Association were entitled to seek appropriate relief for the seizure of the latter institution without going through what the uncontradicted showing of the supporting affidavits demonstrated would have been a useless formality.

As to the matter of the injunction against a merger, the propriety of this phase of the relief granted by the District Court depends fully as much upon the solution

of the constitutional question as to the validity of Section 5(d) as does the phase adjudicating the constitutional invalidity of the seizure. This is necessarily so, for Section 5(d) is the vehicle whereby Congress attempted alike to convey to the Board [Administrator: Ex. Ord. 9070] power to *merge* and consolidate as well as the power to liquidate, "including the power to appoint a conservator or a receiver." If, therefore, as is argued on the merits, Section 5(d) is constitutionally deficient in setting up a standard prescribing the conditions under which associations may be seized and placed in the hands of conservators, it is equally deficient in failing to prescribe a similar standard with reference to mergers, for in neither case may valid official action be taken as a matter of mere whim, personal animosity or for other capricious or arbitrary reasons.

We thus point out the fact that the constitutional question is inescapably present as to both seizure and merger for the reason that in the lower court counsel for appellants expressly disclaimed Fahey's indispensability in so far as the constitutional question as to the validity of Section 5(d) was concerned and expressly refrained from pressing their motion to dismiss in this regard. We quote from the record [R. 675]:

> "Judge Hall. In your motion to dismiss on the ground that Fahey is an indispensable party, and could not be joined in this district in this action, you assert the right to present that motion regardless of whether we are only considering the constitutionality of the statute, or in view of the announcement by the presiding judge that we are limiting the consideration to the constitutionality of the statute, you

are abandoning your motion on the ground that he is an indispensable party?

Mr. Walker. I would like to do neither, your Honor. I would like to defer the argument on it, reserving my point until the court has ruled on the constitutional provision.

Judge Hall. If Fahey is an indispensable party to this suit; doesn't that go to our jurisdiction?

Mr. Walker. Not so far as the constitutional question goes, under the authority of the Nehr* decision. I want to preserve my position.

Judge Hall: I understand. In other words, you do not press your motion to dismiss on the ground of an indispensable party, in opposition—

Mr. Walker. To the constitutional question."

It thus appears, on the record, that the question of Fahey's indispensability was withdrawn from the court's consideration by the appellants in so far as the constitutional question—*the only question presented to the three judge court*—was concerned. From this it follows that appellants' present arguments as to the presence or absence of Fahey and the scope of the relief granted as against him do not touch or concern the main issue in the case—whether or not the assets and properties of the Long Beach Association should be returned to it and its officers because of an unconstitutional and unlawful trespass and ouster. What appellants argue for in this connection, therefore, is not for a *reversal* of the de-

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*Neher v. Harwood, 9 Cir., 128 F. (2d) 846, hereinafter cited to point that where, as here, the attack is upon the constitutional or other authority of the principal officer, he is not an indispensable party.

cree, but for its modification in respect of certain features applicable only to the non-resident Fahey. In this connection they contend that the provisions of Section 57 of the Judicial Code, 28 U. S. C. §118, are inapplicable to the present case, a contention to which we now turn.

B. The Present Cause Is an Action Brought to Enforce a Claim to Real and Personal Property Within the District Where the Action Was Brought, Within the Meaning of Section 57 of the Judicial Code; and Such Relief in Personam as Was Prayed Was Purely Incidental to the Enforcement of Such Claim.

Appellants' principal objections to the applicability of Section 57 of the Judicial Code seem to stem from the fact that relief *in personam* by way of injunction and accounting was prayed. From this, appellants argue that "the main relief" sought is *in personam* rather than an adjudication of property rights. In so contending, they studiously ignore the plain fact that the gist of the cause of action pleaded was the recovery of the $26,000,000 in assets seized by the conservator Ammann, and that every species of relief *in personam* prayed was in aid of attaining that end.

Thus the complaint alleged that real and personal property of the Association situated within the district had been on May 20, 1946, "unlawfully seized, diverted and are now unlawfully held by and detained by and in the possession of" the defendants. [R. 3.] As far as the real property was concerned, this amounted to an allegation, by an owner out of possession, of a wrong-

ful ouster; in other words, the equivalent of a perfect cause of action in ejectment. Compare, for instance, *Spencer v. Kansas City Stockyard Co.*, C. C. Mo., 56 Fed. 741; *Elk Garden Co. v. Thayer Co.*, C. C. Va., 179 Fed. 556. As far as the personal property was concerned, the requisite elements of a case of action in replevin appear. In either case, the complaint certainly stated a "claim to * * * real or personal property"; *and that is all that Section 57 requires to warrant substituted service upon absent defendants.*

It is said that the "main relief" prayed and granted was personal in nature. On the contrary, the main relief prayed was that the officers of the Long Beach Association be restored to full possession of all the property and assets of the association and be restored to and placed in full control of the business thereof. [R. 15.] The other relief prayed, removal of the conservator, injunction and accounting were all secondary to the prayer for restoration to possession and control.

If, as appellants seem to think, the applicability of Section 57 to an action is destroyed because incidental relief *in personam* is prayed or granted, they are sadly in error. See, for instance, *Jellenik v. Huron Copper Mining Co.*, 177 U. S. 1 (substituted service under Act of March 3, 1875 upheld in action to remove cloud upon title to corporate stock; complaint prayed, *inter alia*, injunctive relief against the adverse claimants, the taking of an accounting, and the setting aside of a purported sale

of the stock); *Harvey v. Harvey*, 7 Cir., 290 Fed. 653 (quoted below); *De Rees v. Costaguta*, 2 Cir., 275 Fed. 172 (accounting in aid of action to enforce lien).

The true nature of the incidental powers of the court in an action of this type is excellently set forth in *Harvey v. Harvey*, where the court said:

> "Appellant's contention that the injunction granted relief *in personam* and therefore cannot be based upon service under section 57, which applies to actions *in rem*, is not well founded. This suit is in the nature of a suit to quiet title to personal property within jurisdiction of the court. The court has in its custody the *res*. It puts out its protecting hand and says to the defendants that the plaintiff claims the *res*; that pending the determination of that claim the *statu quo* shall be maintained and the defendants restrained from using the *res*; that if they desire to contest the claim of the plaintiff to this property they shall come into court and do so. Incidental to its jurisdiction over the *res*, the court may use its power of injunction, not to prevent distinctly personal acts by the defendants, disconnected with the *res*, but to prevent the defendants interfering with, disposing of, converting, injuring, or wrongfully using the *res*." (p. 659.)

The foregoing reasoning is fully applicable here, for it is manifest that the relief *in personam* was purely in aid of the exercise of the court's jurisdiction *in rem* over the assets and properties themselves.

C. In an Action Where, as Here, Relief Against Administrative Acts Is Sought on Constitutional Grounds, the Presence or Absence of the Superior (Here Fahey) Is Immaterial in Any Event.

Viewed as an action to which the extra-district process of Section 57 is applicable, the presence or absence of Fahey as a party is of little or no practical importance. Service of process upon him in the District of Columbia conferred upon him the right to appear and defend his actions if he chose. If he did not so choose, the court nevertheless had jurisdiction *in rem* to adjudicate the return of the assets and properties to the Association. If, as is here so bitterly contended, the decree should not have granted injunctive relief as against Fahey, that is a matter of importance only to him alone and one which does not affect in the slightest the court's main holding that the assets and properties under the court's jurisdiction should be returned to the Association.

On the other hand, if we adopt for purposes of argument the contention that the action was strictly *in personam*, the result nevertheless remains unchanged in so far as the principal adjudication of return of the assets is concerned. Ammann, the conservator, was duly served in the district, is before the court and subject in all respects to the court's decree with reference to returning the assets.

The presence or absence of Fahey, on the other hand, becomes immaterial on the *in personam* theory because of the well settled rule (conceded below, as we have shown)

that the presence of the superior is not required where, as here, the attack is upon the *authority* in law to perform the act complained of, as distinguished from an attack upon the ground of abuse of discretion or other impropriety aside from lack of constitutional or statutory authorization. *Colorado v. Toll,* 268 U. S. 228; *Neher v. Harwood,* 9 Cir., 128 F. (2d) 846; *Berdie v. Kurtz,* 9 Cir., 75 F. (2d) 898.

In this connection the claim is made by appellants (Br. p. 55) that the necessity of joining the superior is a matter of "widely conflicting decision." Recourse to the decisions will show, as pointed out in *Neher v. Harwood,* that there is no conflict whatever on the proposition that where the plaintiff claims the statute is unconstitutional, as was claimed and held here, the presence of the superior may and should be dispensed with.

For the reasons given above, it is submitted that the presence or absence of Fahey was wholly immaterial on the main question of return of the assets. We now take up the question of the constitutionality of Section 5(d).

IV.

Section 5(d) of the Home Owners' Loan Act is Unconstitutional for Failure to Specify Reasonably Definite Standards for Administrative Action.

Section 5(d), 12 U. S. C., §1464(d), provides as follows:

> "The Board shall have full power to provide in the rules and regulations herein authorized for the reorganization, consolidation, merger, or liquidation of such associations, including the power to appoint a conservator or a receiver to take charge of the affairs of any such association, and to require an equitable readjustment of the capital structure of the same; and to release any such association from such control and permit its further operation."

In approaching the question of its constitutionality, we agree with appellants (Br. p. 58) that there is here involved no question as to *what* Congress intends to do in the section; namely, to vest in the Bank Administration the *power* to appoint a conservator or a receiver to take over the affairs of an association. We also agree that the sole question in this regard concerns the occasions for the *use* of such power. Whether Congress has sufficiently indicated to the Bank Administration (and we may add, to the potential victims of its *exercise*) the standards and policy which should govern the administrative use of this plenary power to seize and administer, wholly *ex parte*, assets and properties aggregating millions of dollars.

There is, of course, no issue as to the basic proposition that in order for the Act to stand the test of constitutionality in this regard, Congress must have provided, by some manner or means, a reasonably definite guide or

standard governing *when*, which is to say, upon what occasion or under what circumstances, this vast power is to be exercised.

Appellants understandably seek to minimize the extent of this power when they speak of the "narrow reach" of the statute; treat of the power as a "restricted one"; and assert that the range of the discretion in this regard is "necessarily limited." We are necessarily led to inquire in this regard where and how Congress has "restricted" the power or "limited" the discretion when in the same breath appellants assert that the Administrator may make the equivalent of a "most favored nation" use of the *permissive* features of (a) dictionary definitions of the words "conservator" and "receiver"; (b) the constantly expanding body of equity decisions in this field; (c) the statutes governing similar associations in the forty-eight states, the District of Columbia and, we assume, the territories and insular possessions; (d) related Federal statutes, and, last but by no means least, (e) the history of the times and, in particular, of mutual loan associations. These extravagant claims, with all respect, argue much more forcibly than can we that Congress has not prescribed any constitutionally adequate standard whatever as to when and under what circumstances the power of seizure conferred by this Act should be exercised, with attendant results*

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*During the four days following the seizure on May 20, 1946, withdrawals from the Long Beach Association ran as high as $2,000,000 per day; and the aggregate for the first five days was between six and seven million dollars, or more than 25% of the total deposits. (R. 13, 25.)

A. Appellants' Recourse to Functional Definitions, the General Body of Equity Jurisprudence, the Laws of the Forty-eight States and Other Collateral Material in an Effort to Impute Standards Where None Have Been Provided by Congress, Only Serves to Emphasize the Deficiencies of the Statute in This Regard.

As we have indicated, appellants do not dispute the proposition that if Congress has failed to prescribe an adequate standard, the Act is unconstitutional in the particular here under discussion, precisely as the lower court held when it said, with reference to Section 5(d):

> "It makes no attempt to lay down rules for the guidance of the board, nor does it state in what circumstances or under what conditions the board is to merge institutions or appoint a conservator or receiver. It establishes no criterion to govern the board's course. It does not require any finding by the board as a condition of its action. No policy is declared by Congress as to merger, or appointment of conservator. The section gives to the Board unlimited authority to formulate rules for the board's action in the respects mentioned and to do so as it may see fit. The only restrictions on those powers were to be such as the board might choose to put upon itself in the rules and regulations which it, the board, adopted to govern itself. We are unable to find in the Act a declaration of policy or standard of action which can be deemed to relate to the subject of section 5(d)." (R. 377.)

We now turn to appellants' attempts to remedy these shortcomings, which attempts only serve to demonstrate that the holding of the three judge court was in consonance with all applicable authorities. See *Panama Refining Co. v. Ryan*, 293 U. S. 388; *Schechter Corp. v. United*

States, 295 U. S. 495. Compare *Yakus v. United States*, 321 U. S. 414, 423, where the court declared that Congress had laid down standards governing the *occasion* for the exercise of the power there involved. And, to the same effect, see *Bowles v. Willingham*, 321 U. S. 503.

I. Dictionary Definitions of "Conservator" and "Receiver."

It is said (wholly without citation of authority) that the occasions on which such an official may be appointed are "already inferable" from the terms by which Congress has described him: "receiver" and "conservator." And recourse is had both to Webster and to the Oxford English Dictionary to establish the conventional meanings of the words. Just how this throws any light on the congressional intent as to the *occasion* or *occasions* on the occurrence of which the Administrator should be empowered to appoint such an official, is not made clear. The *assumption* is, say appellants, "that the object of the conservation is unable to perform the functions of self-preservation."

We are not, however, dealing with assumptions. Congress has either laid down a standard as to when the power to appoint should be exercised or it has not. And we know of no theory, either in reason or in law, which would justify the use of a mere title as affording a clue as to when or under what conditions the power summarily to seize and administer the property of another should be exercised, for the power to appoint and the power to seize necessarily go hand in hand.

We freely concede that recourse may be had to the dictionary to resolve an ambiguity as to the *meaning* of a

word in a statute. But there is here no dispute as to the *meaning* of these words.

The plain fact is that the mere use of the terms in question affords no evidence whatever as to any congressional intent as to when or under what conditions the power in question should be exercised. The point is, to say the least, bizarre; which no doubt accounts for the fact that appellants are unable to cite any authorities in support of their hypothesis of legislation by "assumption."

We therefore submit that it is entirely unwarranted to *assume*, as appellants (Br. pp. 63-64) ask we assume, that when Congress *summarily* authorized the Federal Home Loan Bank Board to establish rules and regulations for the appointment of a conservator, that it had anything whatever specifically in mind as to the occasion for such appointment.

2. Equity Receivership Doctrines.

"A second source of direction for the Bank Administration in appointing conservators and receivers," we are told (Br. p. 66), "is found in the large body of judicial doctrine, substantially non-statutory in origin, developed by the courts." And it is said that the statute "implicitly refers" the administrator to this "well-developed body of common-law doctrine."

This, with all respect, is another remarkable thesis. Because of the very shortcomings of the statute in the particular under discussion, if we understand appellants aright, the Bank Administration is compelled to look for its guide not to the statute, which it is here confessed

furnishes no guide, but to the body of the general law. Under no other theory could it be said that the statute *implicitly* refers the administrator elsewhere.

The answer is, of course, that the standard or guide must be found in the act itself, either in so many words or by *reasonable* implication. *Panama Refining Co. v. Ryan, supra,* and particularly Mr. Justice Cardozo's dissenting opinion at 293 U. S. 435.

As opposed to this, appellants necessarily contend that Congress intended to vest in the Administrator the power summarily to seize the property of others in any case where he could, after commendable and diligent research, locate a decision favorable to his contentions in either the Federal jurisdiction or in any of the forty-eight states. This, with all respect, is an impossible concept and one which but further emphasizes the shortcomings of the statute.

Reference to the Federal Trade Commission in this connection is wholly inapt. The Federal Trade Commission is a quasi-judicial body, *Federal Trade Commission v. R. F. Keppel & Bros., Inc.*, 291 U. S. 304, and in any event the ultimate meaning of the term "unfair methods of competition" rests with the *courts. Federal Trade Commission v. Gratz*, 253 U. S. 421.

The assertion is also made that no question of the delegation of legislative power would arise if the statute had provided for application to a court for the appointment of a conservator or receiver. So stated, the assertion is

correct, for the court would be exercising its traditional judicial powers. In addition to this, such a hypothetical statute would afford an adequate standard for the appointment, namely, a finding by a tribunal qualified to make it, as to facts warranting such action.

Perhaps the best answer to appellants' present contention, however, is that Congress could have had no such intention as appellants postulate in this regard for the simple reason that to turn the Administrator adrift among the court decisions of 49 jurisdictions would have been palpably unworkable and, hence, a legislative impossibility. And the same is true of appellants' next suggestion along this line.

3. State Statutes and Rules.

It is next said that the effect of the direction in Section 5 (a) that, in formulating its rules, "primary consideration" is to be given by the Bank Administration to the best practices of local mutual thrift and home-financing institutions in the United States" is *expressly to refer the Administrator to the statutes and rules of the forty-eight states governing such institutions.* Just how this reference to the "best practices" of the local institutions is metamorphosed into a congressional intention to adopt the state laws *governing* those institutions (and as such, amendable with every session of the forty-eight legislatures) is not made clear.

However, and in order to meet appellants on their own ground, let us see where this contention leads us. In the

first place, and from the standpoint of plain workability, the Administrator, in ascertaining these multiple statutory guides, would be plunged into a morass similar to that envisaged in his familiarizing himself with the court decisions of the forty-eight states. In the second place, and from the standpoint of an ascertainable and reasonably definite standard for everyone, just what state rules or statutes would he adopt? *All* of them? And if so, in case of a conflict, which would he adopt, the more stringent or the less? A conglomeration of some from some states and some from the others? And if so, which from which? Only the state rules which are uniform? And if so, are there any, and, if so, what are they?

The best that appellants can do along this line is to say that a "general consensus" exists, and at pp. 69-70 they list an agglomeration of state grounds for take-overs. In so doing, they accurately measure the deficiencies in this regard of their own statute. *Every state statute which they cite or to which they refer sets up specific standards and prescribes the grounds for which and the occasions upon which the local institutions may be taken over* by state authorities. A comparison of these state enactments with the Home Owners' Loan Act affords the most eloquent argument which can be made in support of appellees' contentions here. The states have not left the matter to inference and argument. A state institution knows that certain occurrences will render it liable to seizure. A federal institution, on the other hand, is left

at the mercy of the uncontrolled discretion of the Bank Administration, for the simple reason that the Administration itself has been supplied with no guide by Congress.

On the other hand, if, as appellants argue, the intent was to permit the Administration to follow state legislation, again we ask, that of which states? Congress has given no indication. Admittedly the Administration has picked and chosen from the various state procedures as its uncontrolled fancy dictated, for it is said that its list conforms "very closely" to the provisions of "at least" the New York, California, Indiana and Massachusetts statutes. (Br. p. 72.)

Why these, and why the "very closely" and why the "at least"? Why not Texas or Illinois or New Jersey or Ohio or Pennsylvania, to name a few? If the state patterns were those prescribed by Congress, why not conform exactly to whatever pattern Congress had in mind, and eliminate the "very closely" and the "at least"?

The answer is, of course, that Congress *had* no pattern in mind and the Administration was compelled, willy-nilly, to set up its own. Whether it is good or bad is beside the point; *it was not authorized by Congress.*

We next turn to a discussion of appellants' views as to possible standards from the standpoint of the Act itself and other federal statutes assertedly applicable.

B. A Comparison of Section 5(d) With Kindred Enactments of Congress Likewise Emphasizes the Deficiencies of the Section in So Far as Any Standard Is Concerned.

It is pointed out by appellants that Section 5(d) should not be tested in isolation, but rather with reference to the statutory context in which it appears, a proposition which is, of course, not disputed. There is no question but what the Act as a whole sets forth, save for the particular under discussion, a comprehensive plan for the organization and governance of federal savings and loan associations; a fact which but renders the failure to set a standard for the occasion of the appointment of a conservator or receiver only the more glaringly apparent. The result is that recourse to the rest of the Act is of no avail to supply the deficiency in Section 5(d).

Reference is made, among other things, to the already discussed provision in Section 5(a) with reference to giving primary consideration to the best practices of local thrift institutions. This is treated as a "general guide" (Br. p. 74) but appellants have heretofore pointed out (and they again point it out at p. 76) that the effect of this provision is to permit the Administration to take cognizance of the laws of some or all or a few of the forty-eight states, rather than setting up a standard in the Act itself. Other "general guides" are suggested, dealing with such matters as good character as to charter applicants, necessity for the creation of the institution and reasonable probability of its success. What these matters have to do with a standard for the appointment of conservators and summary seizures of going concerns is not made to appear.

Appellants point out the eligibility requirements of the Federal Home Loan Bank Act and of the Federal Sav-

ings and Loan Insurance Corporation and conclude that "regard" is to be had, in the appointment of a conservator, to these provisions (as well, we assume, as to the dictionary, to the body of general equity jurisprudence and to the laws of the forty-eight states and the District of Columbia). It is very well to give "regard" to these matters, we suppose, but where is any definite standard afforded by which a federal association may know whether or not it faces seizure?

The plain fact is that appellants' argument proves too much. If, in formulating his rules for the appointment of conservators and receivers, the Administrator is at liberty to pick and choose from the entire field of Federal statutes, state statutes and the judicial decisions of all of the American jurisdictions, it is the Bank Administration and not Congress, which is doing the law-making; which is precisely what the three judge court held.

Appellants mention other Federal statutes where seizures by sundry officials are provided for. Without exception, they deal with *seizures for cause, and the causes are specified*, again making the deficiencies of the present act, and particularly Section 5(d), more manifest.

Thus, Section 203 of the Bank Conservation Act, 12 U. S. C. §203, provides for the appointment of a conservator *whenever the Comptroller shall deem it necessary to conserve the assets of any national bank for the benefit of its depositors and other creditors;* the Banking Act of 1933, 12 U. S. C. §71a; authorizes the Comptroller to appoint a conservator *whenever any national bank or Federal Reserve member bank violates the requirement that such institutions have from five to twenty-five directors;* and the National Housing Act, 12 U. S. C. §1729, em-

powers the Federal Savings and Loan Insurance Corporation to act as conservator or receiver *whenever any savings and loan association shall be in default.*

Even more significant, however, is the parent statute of all, the National Banking Act, 12 U. S. C. §21 *et seq.*, which provides at 12 U. S. C. §191 for the appointment of a receiver *whenever* (a) a national bank shall be dissolved or its charter forfeited, (b) a judgment against it shall be unsatisfied for thirty days, or (c) the Comptroller becomes satisfied of its insolvency. And §192 provides for a similar appointment *whenever* the Comptroller is satisfied that any national bank is in default on its circulating notes.

It is submitted that the comparison of these statutes with the Home Owners' Loan Act inevitably compels the conclusion that the latter sets up no standard at all in the particular under discussion. Precisely as was the case with the state statutes earlier under consideration, with their definite standards for administrative seizures, so here the Federal statutes to which we have referred lay down precise guides both for the administrative official involved and for the institution subject to the exercise of the power. The Home Owners' Loan Act, however, leaves the Bank Administration free to select its own standards, as appellants not only confess but actually argue, from such sources as it may select at random, state or federal, legislative or judicial. To paraphrase the excellently chosen words of Mr. Justice Cardozo in *Panama Refining Co. v. Ryan*, 293 U. S. at p. 434, the Bank Administration may "roam at will, picking and choosing as it pleases." The statute is, therefore, plainly defective.

V.

The District Court Did Not Err in Entering Final Judgment.

Appellants complain bitterly of the entry of final judgment at what they contend was a preliminary stage of the action. Since this point is urged as a separate ground of reversal, it must be evaluated from the premise that the District Court's holding as to the constitutional question was correct, but that procedurally the court erred in entering a final judgment as distinguished from merely ruling on the preliminary matters before it.

In order to establish error, and above all prejudicial or reversible error, it is, of course, necessary that appellants show that the procedure adopted by the court deprived them of some substantial right. As to this, they assert that they were deprived of their right to answer and of their right to a trial on the facts.* And this, in turn, depends upon what their defenses were as against the claim of unconstitutionality which was upheld by the court, for if there were no material issues of fact to be tried, appellants, naturally, could not have been prejudiced by the entry of a final decree on questions of law alone.

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*As to this, the record shows that Ammann filed an answer to the complaint on October 21, 1946, subsequent to entry of the decree and without waiving the questions presented on his appeal. [R. 523.] Fahey filed no answer, apparently electing to stand upon his motion to quash.

A. Entry of a Final Judgment Without a Trial Is Warranted Where There Are No Material Issues of Fact to Be Tried.

So far as appellants' substantive rights are concerned, the result of the court's action here was precisely the same as it had granted a motion of plaintiffs for judgment on the pleadings or had granted a motion of plaintiffs for summary judgment. Compare Rule Civil Procedure 56(c). A party, be he plaintiff or defendant, has no valid cause for objection if a court renders judgment against him without a trial on the ground, either that his complaint is insufficient, on the one hand, or his answer fails to state a defense, on the other. And this proposition applies as well to injunction cases as to any others. *Allegheny Oil Co. v. Snyder, Gillmor v. Brown*, 6 Cir., 106 Fed. 764 (on motion to dissolve injunction, same made perpetual without trial); *Coty v. Prestonettes*, 2 Cir., 285 Fed. 501, reversed on other grounds, 264 U. S. 359 (preliminary injunction, denied by trial court, made perpetual by Circuit Court of Appeals); *Richardson v. Blalock*, 118 S. C. 438, 110 S. E. 678 (final judgment on application for temporary injunction).

The question would then seem to be whether the pleadings of defendants raised any material issue of fact as against the basic holding of unconstitutionality. nd in this connection it is not amiss to point out that the two decisions cited by appellants as to this phase of the case have nothing to do with the problem. *In re Sanford Fork & Tool Co.*, 160 U. S. 247, simply held that where a judgment for plaintiffs on exceptions sustained to an answer was reversed, the case was set at large and the defendants were not, *ipso facto*, entitled to a judgment against the plaintiff. *William J. Friday & Co., Inc. v.*

United States, 3 Cir., 61 F. (2d) 370, is to the same effect. There a demurrer to the complaint had been sustained and, plaintiff electing to stand, judgment was entered for defendants. On appeal, which resulted in a reversal and remand, it was unavailingly contended that judgment should have been entered for plaintiff on the demurrer *to his own complaint*. Neither case detracts from the proposition that where a pleading tenders no material issue of fact, judgment for the other party without a trial is proper.

1. Since It Was Conceded That the Assets of the Long Beach Association Were Seized Under the Purported Authority of Section 5(d) of the Home Owners' Loan Act, the Responsive Pleadings of Defendants Raised and Could Have Raised No Material Issue of Fact in View of the Holding of Unconstitutionality.

It is not disputed by anyone that the assets of the Long Beach Association were seized under the purported authority of Section 5(d). This was the basic premise of the argument of both sides below. In view of this fact, with the holding of unconstitutionality rendering the defendants *trespassers ab initio*, were there any defenses on the facts available to them and, if so, since the burden of overthrowing the judgment for error is on appellants, does the record show what they were?

Appellant Fahey offers no obstacle in this regard, for he filed no answer and has hence made no showing of any sort that he had any defenses on the facts. We have no objection to assuming, however, that his defenses on the merits would have been the same as those of Ammann.

Ammann's answer pleaded four defenses. The first alleged the insufficiency of the complaint, a defense in law

held insufficient by the denial of his motion to dismiss. The second defense, while containing formal denials with reference to the allegations of the complaint, nevertheless admitted [R. 524] that on May 20, 1946, he appeared at the offices of the Long Beach Association and announced his appointment as conservator; and, as we have pointed out, it was in any event conceded throughout the proceedings below that he had seized the assets under purported authority of Section 5(d). The holding of unconstitutionality, therefore, operated to deprive him of any defense as against the charge in the complaint of an illegal seizure. His third defense set up estoppel as a defense; the same point that we have earlier answered herein by showing that there could have been no estoppel to attack the constitutional validity of a severable portion of the statute. The fourth defense set up the same failure to pursue administrative remedies which, as we have earlier pointed out, the Long Beach Association was not called upon to pursue for three different reasons.

It thus follows that if this Court agrees with the contentions of appellees on (1) the constitutional point (2) the estoppel point and (3) the administrative remedy point, the action of the court below in ordering final judgment did not operate to deprive appellants of any substantial rights whatever. Under such a holding, it would follow that the Ammann answer did not state a defense, since it raised no material issue of fact. Indeed, under the circumstances we know of no defenses which *could* have been raised; and certainly the brief of appellants has pointed to none. Such being the case, the entry of final judgment was proper.

VI.

The Third Party Complaint Against the Federal Home Loan Banks, Including This Appellee, Was Properly Allowed.

This appellee was brought into the case through the medium of a third party complaint filed by the Long Beach Association against this appellee, the Federal Home Loan Bank of Portland, and the so-called Federal Home Loan Bank of San Francisco. [R. 222.] The third party complaint prayed, in substance, that the court determine and declare the status of the Long Beach Association as a stockholder of this appellee and also determine which of the banks in question held assets of the Long Beach Association deposited with this appellee prior to March 29, 1946. It was upon this date that this appellee by means and practices remarkably similar to those employed in the seizure of the Long Beach Association, was summarily seized by appellants Fahey and Ammann, and by fiat orders* of the former ostensibly (a) *merged* with the then existing Federal Home Loan Bank of Portland to form a new entity (Federal Home Loan Bank of San Francisco) and (b) *dissolved*, a combined feat of no mean attainment. This appellee appeared and answered the third party complaint [R. 371]; and also filed a cross-claim [R. 346], to enforce legal and equitable claims to obtain possession of, and to remove clouds upon the title to its assets in the value of some $40,000,000 seized as above set forth and by the Home Loan Bank Administration turned over to the ostensible San Francisco Bank. Appellant Fahey was joined as a third party defendant and substituted service was had upon him in the District of Columbia under Judi-

*These documents are set out in full at R. 293-295; 349-351.

cial Code Section 57. [R. 370.] The issues arising under the third party complaint and the above cross-claim have not been tried.

Appellants claim that the filing of the third party complaint in question against the Federal Home Loan Banks should not have been allowed, and they assert in this regard (Br. p. 100) that there is "no connection" between the "merger" of this appellee with "the Federal Home Loan Bank of Portland (hereinafter called Federal Home Loan Bank of San Francisco)." [R. 350.] The record is to the direct contrary, which is alone ample justification for the exercise by the District Court of its discretion in permitting the third party complaint to be filed.

A. Permission to File a Third Party Complaint Is Discretionary, and Under the Facts Here Present There Was No Abuse of Discretion.

It should be borne in mind that the third party complaint did not name either of the appellants herein as third-party defendants, a fact which makes it rather difficult to comprehend why they have any ground of complaint as to the order permitting its filing.

Aside from this, it is not open to dispute that the District Court has a wide range of discretion with reference to the granting or withholding of leave to file third party complaints, *Reed v. Hickey*, D. C. Pa., 2 F. R. D. 92; *Falcone v. City of New York*, D. C. N. Y., 2 F. R. D. 87, and the question here is, therefore, whether or not the District Court abused its discretion under the circumstances revealed by the record. It is submitted that it did not.

As against the claim of appellants that there is no connection between the seizures of this appellee by the Home Loan Bank Administration on March 29, 1946, and the seizure of the Long Beach Association on May 20 of the same year, the record reveals facts which lead directly to the opposite conclusion.

From these facts the District Court was amply justified in concluding, at least preliminarily, that both the bank seizure and the Long Beach seizure constituted related attempts by the Bank Administration to retaliate upon the officers and directors of both institutions for their refusal to accept its arbitrary dictates.

The connection between the two seizures is perhaps best epitomized in the verified cross-complaint of the Long Beach Association, which sets forth the following facts:

Prior to March 24, 1946, the Federal Home Loan Bank of Los Angeles was one of the twelve of such banks existing throughout the United States with offices at Los Angeles, California. On November 23, 1944, the then president of the Los Angeles Bank ,one M. M. Hurford, had died. T. A. Gregory, president of the Long Beach Federal Savings and Loan Association, was also one of the members of the board of directors of the Los Angeles Bank. Subsequent to Hurford's death, one C. E. Berry, vice president of the Los Angeles Bank and who had served that institution since 1934, was elected president of the Bank by its board of directors. Under the Federal Home Loan Bank Act the approval of defendant and appellant Fahey, as Commissioner of the Federal Home Loan Bank Administration, is required before a president elected by the directors of any Federal Home Loan Bank can take office. Various disputes and controversies as to such suc-

cession then arose between Fahey and the directors of the Los Angeles Bank. Berry was three times elected president by the directors, and such action was unanimously confirmed by all of the stockholders of the Bank, but each time Fahey refused to approve such election and refused to give any reasons therefor. T. A. Gregory of the Long Beach Federal Savings and Loan Association, in addition to being a director of the Los Angeles Bank, was also a member of various committees which had been appointed from the stockholders of the Los Angeles Bank and from the various loan associations throughout the State of California. As such member, Gregory was in active and frequent contact with Fahey in connection with the Los Angeles Home Loan Bank matter. Ultimately, Fahey, unable to dictate to the directors of the Los Angeles Bank as to the matter of the succession to the office of president, on March 29, 1946, and with the assistance of defendant and appellant Ammann, unlawfully and arbitrarily seized all of the assets, securities, affairs and business of the Los Angeles Federal Home Loan Bank, which at the time of such seizure had assets in excess of $43,000,000. On the same day Fahey and Ammann attempted and purported to merge the Los Angeles Home Loan Bank into the Federal Home Loan Bank of Portland, having assets of about $9,000,000, and named the bank thus seized and ostensibly merged Federal Home Loan Bank of San Francisco. By said seizure and purported merger, Fahey and Ammann claimed to have terminated the existence of the Federal Home Loan Bank of Los Angeles and purportedly discharged all of its then officers and directors. At the time of said seizure, Long Beach Federal Savings and Loan Association owned stock of the face value of $360,-

000 and owned a proportion of the undivided surplus of said Bank of approximately $40,000.*

Subsequent to the seizure of the Los Angeles Bank, a committee of its stockholders was formed, and T. A. Gregory became one of the members of such committee. One of the purposes of this committee was that of raising funds from the stockholders of the seized Los Angeles Home Loan Bank for the purpose of instituting legal action against Fahey and Ammann for their unlawful and arbitrarily destructive acts in connection with the Federal Home Loan Bank of Los Angeles. In addition to this, Gregory was active for many months in Washington, D. C. in seeking a congressional investigation of the acts of the defendants Fahey and Ammann in their seizure and general conduct of the Los Angeles Bank matter. The efforts to secure a congressional hearing were successful, and a date was set for such hearing. These matters were all known to Fahey and Ammann, and in an effort to prevent Gregory from testifying at such congressional hearing and for the purpose of intimidating all other Federal Savings and Loan Associations throughout Southern California and to prevent the bringing of a suit in the Federal courts concerning the seizure of the Los Angeles Bank, and as a calculated step to destroy the Long Beach Association, Fahey and Ammann then and on May 20, 1946, unlawfully and wrongfully seized the Long Beach Federal Savings and Loan Association. [R. 207-210.]

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*In addition, Long Beach Federal Savings and Loan Association had in excess of $8,000,000 in United States bearer bonds on deposit in the Federal Home Loan Bank of Los Angeles at the date of the seizure of the latter. [R. 8.]

One of the main purposes of the third party practice is, of course, to eliminate circuity of action. The effect of the facts we have just set forth was to charge Fahey and Ammann with nothing more nor less than a conspiracy to wreck, not one, but two substantial financial institutions. One would assume that it would be their own preference to disprove these charges, if they could, in one plenary action; but, be that as it may, the District Court was, under the circumstances, amply justified in exercising its discretion in granting leave for the Long Beach Association to ascertain just what its status presently is as a stockholder and depositor-member of this appellee, on the one hand or of the ostensible Home Loan Bank of San Francisco neé Portland, on the other. The District Court, therefore, did not err in granting leave to file the third party complaint; and, as we have pointed out above, it is difficult to perceive in any event how either of the appellants were prejudiced thereby, since they were not named as parties therein.

For the reasons hereinabove given, it is respectfully urged that the judgment appealed from should be affirmed.

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